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Nos. 86-1380, 86-1424 and 87-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARKANSAS PUBLIC SERVICE COMMISSION, *et al.*,
Petitioners,
v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ARKANSAS POWER & LIGHT COMPANY,
Petitioner,
v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

REYNOLDS METALS COMPANY, *et al.*,
Petitioners,
v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF ON BEHALF OF THE ARKANSAS PUBLIC SERVICE COMMISSION, THE STATE OF ARKANSAS, THE ARKANSAS-MISSOURI CONGRESSIONAL DELEGATION AND THE MISSOURI PUBLIC SERVICE COMMISSION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Those opposing the Petitions for a Writ of Certiorari do not claim that the issues raised are unimportant. They do not deny that the case involves four states, billions of dollars, and a fundamental interpretation of the Federal Power Act and its impact on the continued effectiveness of State regulatory authority. Although some parties claim that the jurisdictional issue herein is unrelated to that raised in *Mississippi Power and Light Co.* v. *State of Mississippi*, No. 86-1970, *jur. postponed*, 108 S.Ct. 63 (1987), a case pending before this Court, the Federal Energy Regulatory Commission ("FERC") admits that the "FERC's order in the present case is indeed a premise of the dispute in *Mississippi Power & Light*." Brief for the FERC in Opposition at 21. Rather, the opposing parties oppose the granting of the Petitions for a Writ of Certiorari based merely upon their view of the merits of the case. In fact, the law supports the contentions of the Arkansas-Missouri Parties.[1]

THE FERC CANNOT REGULATE NON-JURISDICTIONAL MATTERS

Opposing parties claim that the FERC has obvious jurisdiction to reallocate the amount of power from the Grand Gulf nuclear powerplant ("Grand Gulf") based on a simplistic analysis. First, they claim that the contracts in question[2] are jurisdictional, a fact which the Arkansas-Missouri Parties do not dispute.[3] Second, they

[1] Those submitting the instant brief, identified herein as the "Arkansas-Missouri Parties", are the Arkansas Public Service Commission ("APSC"), the State of Arkansas, the Arkansas-Missouri Congressional Delegation, and the Missouri Public Service Commission ("MoPSC").

[2] The contracts in question are the Unit Power Sales Agreement ("UPSA") and the 1982 System Agreement.

[3] This recognition of jurisdiction distinguishes the instant case from cases cited by opposing parties, such as State of Minnesota v. FERC, 734 F.2d 1286 (8th Cir. 1984) and South Dakota Public Utilities Comm'n v. FERC, 690 F.2d 674 (8th Cir. 1982), in which FERC jurisdiction over a pooling agreement was challenged.

claim that the entities which filed the contracts in question are "public utilities" and thereby jurisdictional, a fact that the Arkansas-Missouri Parties do not dispute. Third, they claim that all matters within a jurisdictional contract filed by a jurisdictional entity are subject to modification by the FERC. This last contention forms the core of the dispute.

A contract is jurisdictional if it includes any matter subject to FERC jurisdiction. Such jurisdictional contracts, however, may include nonjurisdictional matters. Consider, for example a contract which provides for both the sale of electricity for resale and a sale of a block of football tickets. Merely because the FERC has jurisdiction over the sale of electricity does not expand its jurisdiction to cover the appropriate price of football tickets, albeit that both matters are governed by the same contract.

Similarly, the UPSA includes both jurisdictional and nonjurisdictional matters. The FERC has the right and the obligation to determine the appropriate rate for a wholesale sale of power, as provided in the UPSA. It does not have jurisdiction, however, to reallocate the amount of power that each signatory to the UPSA purchases from Grand Gulf.[4]

The FERC lacks jurisdiction to reallocate the output of Grand Gulf because of the prohibition against FERC jurisdiction over generating facilities in Section 201 of the Federal Power Act, 16 U.S.C. § 824 (1982), and, independently, because of the lack of FERC authority to regulate purchases of electric power.

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[4] No party hereto has cited any case other than the decision below in which a court upheld the reallocation by FERC of the amount of power produced by an electric generating unit. Municipalities of Groton v. FERC, 587 F.2d 1296 (D.C. Cir. 1978), Mid-Tex Electric Co-op, Inc. v. FERC, 773 F.2d 327 (D.C. Cir. 1985), and South Dakota Public Utilities Comm'n v. FERC, 690 F.2d 674 (8th Cir. 1982), ostensibly cited for this proposition, do not involve an alteration of the amount of generating capacity purchased or sold.

THE FERC LACKS AUTHORITY TO REALLOCATE THE OUTPUT OF GENERATING FACILITIES

The nature of the prohibition in Section 201 of the Federal Power Act against FERC jurisdiction over generating facilities becomes apparent upon an analysis of the methods of ownership of generating facilities. In the electric utility industry, there are a number of ways of acquiring the benefits of ownership of a generating unit. First, and most simply, a utility may own a generating unit to be used solely for its own benefit. Second, a generating unit may be jointly owned by more than one utility. Third, one utility may sell the output of a generating unit to other utilities by means of a unit power sale. Through such unit power sale, the purchasing utilities essentially pay the entire cost of their share of the generating facility. Such assumption of obligations has been deemed to constitute the equivalent of a sale and purchase of generating facilities. *See Otter Tail Power Company v. Federal Power Comm'n*, 473 F.2d 1253 (8th Cir. 1973).

If a utility constructs a generating facility for its own use or if utilities jointly own a generating facility, the FERC cannot reallocate the output of the facility, because there is no jurisdictional transaction. If a utility purchases the output of a generating facility by means of a unit sale, FERC jurisdiction over the contract and the rates pursuant thereto does attach. This form of ownership does not, however, give the FERC greater jurisdiction over the amount of generating capacity sold to participants than would the other two forms of ownership.

In the instant case, the FERC not only altered the allocation of the facility subject to the UPSA, Grand Gulf, it used the UPSA to assert jurisdiction over non-jurisdictional facilities. Even the FERC must admit that it has no jurisdiction to reallocate the Waterford

nuclear powerplant ("Waterford"), owned solely by Louisiana Power & Light Company ("LP&L") or the ANO plants, owned solely by Arkansas Power & Light Company ("AP&L"). FERC, in improperly expanding its jurisdiction, utilized Grand Gulf, as a surrogate, to reallocate electric output based upon the amount of Waterford owned by LP&L and the amount of ANO owned by AP&L, as well as Grand Gulf ownership, thus, essentially, reallocating Waterford and ANO.[5]

Opposing parties herein suggest that the FERC has jurisdiction to reallocate the output of Grand Gulf either because the exemption in Section 201 is inapplicable to a sale of power at wholesale or because Sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d and 824e (1982), "specifically provide" for jurisdiction over generating facilities, as contemplated within Section 201(b) of the Act, 16 U.S.C. § 824(b)(1) (1982).

This Court in *Connecticut Light & Power Co. v. F.P.C.*, 324 U.S. 515 (1945), specifically rejected the contention that a facility is jurisdictional even if subject to the exemption in Section 201(b)(1) "where the Act provides for their regulation." *See* 324 U.S. at 528. This Court stated that such an interpretation:

> [S]eems to get the cart before the horse, for whether the Act provides for such regulation depends on whether the facilities are under the jurisdiction of the Commission; the Commission's jurisdiction does not depend on some independent application of the regulatory provisions.

Id. This statement constitutes a specific rejection of the ruling in *Hartford Electric Light Co. v. Federal Power Comm'n*, 131 F.2d 953 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943), a case on which several

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[5] The Louisiana Consumers apparently view this case as an allocation of both Grand Gulf and Waterford. *See* (Louisiana Consumers) Brief in Opposition at 5, 15.

parties to this proceeding rely as authority for the proposition that generating facilities used for wholesale sales are subject to FERC jurisdiction.[6]

THE FERC CANNOT FORCE A PURCHASE OF POWER

Although the FERC has no authority over purchases of electricity and cannot force such purchases, utilities may voluntarily agree to purchase power. To constitute a forced purchase, it is elemental that a FERC order to that effect must issue. Thus, contrary to the position of the Louisiana Parties,[7] the Arkansas-Missouri Parties had no grounds to complain regarding the so-called "up-front costs" of White Bluff 1 and 2. Those payments were made in accordance with a contract among private parties, not in accordance with a reallocation order by the FERC. Similarly, contrary to the contention of opposing parties herein, the FERC never ordered the purchase of electric power in the case leading to *Pennsylvania Water & Power Co. v. Federal Power Comm'n*, 343 U.S. 414 (1952). Rather, as articulated in the circuit court decision in that case, the Commission had ordered a rate reduction, ordered the utility to file its rate schedule reflecting such reduction, and assumed the continuation of a pre-existing contract. *See Pennsylvania Water & Power Co. v. Federal Power Comm'n*, 193 F.2d 230, 247 (D.C. Cir. 1951). The circuit court did not order the initiation of a contract to "buy" electricity, as claimed by opposing parties in this proceeding.[8]

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[6] Contrary to the assertions of Louisiana Parties herein, this Court did not *adopt* the findings of *Hartford* in *Connecticut Light & Power*, 324 U.S. at 528, n.6. It merely *recited* such findings.

[7] Brief Opposing Petitions for Certiorari on Behalf of the Louisiana Public Service Commission and State of Louisiana at 17.

[8] Nor did the FERC or the circuit court order the purchase of power in *Central Iowa Power Coop. v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979).

AFFIRMATION OF THE DECISION WOULD IMPROPERLY EXPAND FERC AUTHORITY

Some parties to this proceeding attempt to portray the instant case as a continuation of the traditional exercise of FERC jurisdiction. In fact, the instant case deals with an attempt to expand that jurisdiction improperly and monumentally. The FERC suggested the extent of such expansion in its Brief in Opposition herein, where it claimed that it always has jurisdiction to reform a contract which "allocates a commonly-incurred cost between two utilities." FERC Brief in Opposition at 13.

Prior to the instant case, the FERC had never altered a contract to require some utilities to increase and some to decrease their purchase of power from a generating plant.[9] The FERC attempts to justify its departure from past practice by claiming that the Middle South Utilities ("MSU") system was a highly integrated one and, therefore, apparently subject to being treated as a single, monolithic utility (although the FERC denied treating the MSU system as a monolithic utility).[10] Now, the FERC is claiming it can perform such reallocation among any utilities, whether affiliated or not.

The FERC claims the authority to allocate or reallocate any commonly-incurred costs between two utilities buying and selling power. If this claim is correct, the FERC would have enormous power to alter otherwise nonjurisdictional transactions. Consider, for example, a contract

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[9] Mississippi Industries cites Nantahala Power and Light Co. v. FERC, 727 F.2d 1342, 1348 (4th Cir. 1984), Connecticut Light and Power Co., 55 F.P.C. 1986, 1989 (1976) and Georgia Power Co., 52 F.P.C. 1343, 1349 (1974) as support for the claimed "well recognized FERC authority" to allocate costs on a system-wide basis. *See* Brief for Mississippi Industries in Opposition at 11. The FERC did not alter the utility's cost allocation in any of these cases, and none of these cases resolved the question of whether the FERC has authority to roll-in generation costs.

[10] *See* Appendix at 117a.

for the sale of coal to three electric utilities. Normally, a contract for the sale of coal would not be jurisdictional before the FERC, and such a contract would not be filed. If, however, one of those utilities filed a wholesale rate with the FERC, could the FERC force a reformation of the otherwise nonjurisdictional coal contract? Similarly, consider a unit power sale to three utilities, one of which is a municipality under the Federal Power Act, 16 U.S.C. § 824(f) (1982). Could the FERC force an alteration of unit power purchases, thus either directly or indirectly regulating the amount of power which may be purchased by the otherwise nonjurisdictional municipality? [11] The FERC simply lacks such far-reaching authority to modify such contractual provisions.

THE FERC CANNOT DECIDE ALL PRUDENCE ISSUES

Contrary to suggestions of opposing parties herein, the FERC has limited authority to find imprudence in the instant situation. The FERC could determine whether it was prudent for MSE to construct Grand Gulf rather than constructing an alternative powerplant, constructing a smaller powerplant, purchasing power from other

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[11] This is not to say that the FERC may not find a purchase of coal or of a portion of a powerplant to be imprudent in determining the appropriate cost of service in a wholesale transaction. A determination of imprudence, however, carries a heavier burden than a determination that a transaction is unjust, unreasonable, or unduly discriminatory. A utility has the burden of proof to show rates are just, reasonable and not unduly discriminatory, whereas the prudence of its actions is presumed absent a showing of a significant doubt regarding such prudence. *See* Anaheim, *et al.* v. FERC, 669 F.2d 799, 809 (D.C. Cir. 1981). Prudence must be examined as of the time management made its decision to determine whether its decision was prudent. *See* New England Power Co., 31 FERC (CCH) ¶ 61,047 (1985); Re Union Electric Co., 66 P.U.R. 4th 202, 213 (March 29, 1985). In the instant case, the FERC determined what it considered to be the discriminatory nature of the transaction based upon current circumstances, long after the relevant management decisions were made. *See* Appendix 127a. Its determination did not rest upon the unreasonable activities of management. There was no investigation or finding of imprudence.

sources, or following another alternative. The FERC, in the confines of a wholesale rate case, also could have determined whether the construction of Grand Gulf was conducted in a prudent manner or whether the cost of Grand Gulf would have been less with prudent management. However, the FERC is without authority to decide whether it was prudent for LP&L, Mississippi Power & Light Company or New Orleans Public Service, Inc., to have entered into the contract to purchase Grand Gulf rather than to have purchased an alternative source of power supply. Only the States may make that decision. APSC and MoPSC may be constrained from making a prudence determination regarding AP&L, because AP&L is purchasing a portion of Grand Gulf only as a result of the FERC order which forces it to do so.

As many parties herein have admitted,[12] the individual States could have certified Grand Gulf or determined the prudence of building Grand Gulf or continuing construction of Grand Gulf. The regulatory gap which prevents the States and FERC from determining the prudence of purchase arises only where the FERC has reallocated the output of Grand Gulf, as it has done here.[13]

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[12] There is also a regulatory gap created by the FERC decision, because if the FERC can reallocate individually built plants at will, a State's decision to allow construction of the plant to meet native needs becomes meaningless. Instead, a local utility can have a large amount of excess capacity or inadequate capacity years after a State certification proceeding, for the sole reason that the FERC has forced the utility to increase or decrease its unit power purchases.

[13] The Arkansas-Missouri Parties feel constrained to address the references herein to purported "internecine" litigation. *See* Brief for Mississippi Industries in Opposition at 14; (Louisiana Consumers) Brief in Opposition at 17. Each State Commission has the statutory responsibility to ensure that its ratepayers are not charged unjust, unreasonable, or unduly discriminatory rates. If the Commission reduces unjust, unreasonable, or discriminatory rates, the utility must absorb that reduction. Such State Commission action in no way transfers costs to other jurisdictions. Rather, it assures

CONCLUSION

For the foregoing reasons and for the reasons cited in the Petition for a Writ of Certiorari and in the Supplemental Memorandum filed herein by the Arkansas-Missouri Parties, the Arkansas-Missouri Parties urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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responsible management decisions by the involved utilities. If utilities can escape such responsibility by making certain that FERC allocates 100% of a powerplant, no matter how unreasonable the utility decision to make a unit power purchase from that facility, the utility has essentially isolated itself from liability and imposed all risk upon ratepayers. As a result, the utility has no incentive to assure management efficiency, and the underlying purpose of regulation is lost.